U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: March 30, 2000

CASE NO.: 1999-STA-00037

In the Matter of

MICHAEL HARRISON
Complainant

v.

ROADWAY EXPRESS, INC.
Respondent

Appearances:

Paul O. Taylor, Esquire
For Complainant

Paul M. Sansoucy, Esquire
For Respondent

Before: ROBERT D. KAPLAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act"), as amended, 49 U.S.C. §31105 (formerly 49 U.S.C. § 2305), and its implementing regulations, 29 C.F.R. Part 1978, based on a complaint filed with the Secretary of Labor alleging that Roadway Express, Inc. (hereinafter "Respondent" or "Roadway") discharged Complainant in violation of the Act. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

II. PROCEDURAL HISTORY

Respondent terminated Complainant's employment on July 2, 1998. (CX 27)[1] Complainant filed complaints with the Occupational Safety and Health Administration ("OSHA") on July 27, 1998[2] and February 1, 1999. OSHA investigated the complaints on behalf of the Secretary of Labor. After the investigation, on May 13, 1999, the OSHA Acting Regional Administrator issued Secretary's Findings in which the complaint was found to be without merit and was dismissed. (ALJ 1) On May 24, 1999, Complainant timely objected to the Secretary's Findings and requested a hearing, pursuant to 29 C.F.R. §§ 24.5(d) and 24.6.

Hearing was held before me in Buffalo, New York on August 31 and September 1, 1999, where the parties had full opportunity to present evidence and argument. Respondent and Complainant filed post-hearing briefs on February 14 and 15, 2000, respectively.

III. THE PARTIES' CONTENTIONS

Complainant alleges that Respondent's termination of his employment violated the Act because he was discharged in retaliation for his repeated complaints about safety. Specifically, Complainant alleges that he was terminated as a result of safety complaints he filed with OSHA on June 19, 1998, for performing safety inspections on yard horses, and for "red-tagging" trailers he found to be defective. (TR 14; Complainant's Brief, p. 23)

Respondent denies that it discharged Complainant for the reasons stated by Complainant. Rather, Respondent contends that Complainant was discharged because he repeatedly violated its rules and disregarded instructions from his supervisors. (TR 30-31; Respondent's Brief, p. 19) Respondent avers that it was not motivated by any protected activity by Complainant.

IV. ISSUES

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[1]The following abbreviations are used herein: "CX" denotes Complainant's exhibit; "RX" denotes Respondent's exhibit; "ALJ" denotes Administrative Law Judge's exhibit; "TR" denotes the transcript of the August 31 and September 1, 1999 hearing.

[2]Respondent argued that no complaint had been filed within 180 days of its notice of employment termination given to Complainant on July 2, 1998, in compliance with the 180-day statute of limitations in the Act. By Order dated December 16, 1999 (attached hereto as an "Appendix"), I found that Complainant's visit to OSHA on July 27, 1998 constitutes a valid and timely complaint. The December 16, 1999 Order is incorporated into this Recommended Decision and Order.

1. Whether Respondent discharged Complainant in violation of the Act.

2. If so, what is the appropriate remedy.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent does not controvert that the parties come within the jurisdiction of the Act, and based on the record I so find.

A. Summary of the Evidence

Respondent is a motor carrier engaged in commercial motor vehicle operations. (Respondent's Answer, p. 1) Complainant was hired by Respondent on May 6, 1989, as a casual employee, and became a full-time employee on October 3, 1989. (TR 36) Initially, Complainant worked at Respondent's truck terminal facilities in Toledo and North Lima, Ohio. (TR 36-38) In April of 1997, Complainant was transferred to Respondent's Buffalo terminal, located in West Seneca, New York. (TR 44-45) At that location, Complainant worked as a switcher and was represented by Teamsters Local Union No. 357 ("Local 357"). (TR 46)

As a switcher, Complainant performed two primary functions in the terminal yard: (1) he operated yard tractors (also called yard horses) wholly within the Buffalo terminal, pulling trailers from one terminal door to another or between other locations in the terminal ("switching" duties); and (2) he released or "dropped" trailers from inbound over-the-road tractors or hooked trailers to outbound over-the-road tractors ("drop and hook" duties). (TR 369, 579) While performing drop and hook duties, Respondent required Complainant to perform a complete and thorough pre-trip inspection of its equipment.[3] (TR 369) However, when Complainant was shuttling trailers, Respondent restricted him to performing only a visual check of yard horses and trailers for obvious defects. (TR 23-24)

Respondent's equipment that is found to be unsafe to operate is placed out of service by being "red-tagged." (TR 513) Prior to July 9, 1997, switchers had placed red tags on equipment they found to be unsafe. (TR 634) On July 9, 1997, Ray Tangent, Respondent's relay manager, issued a memorandum stating that switchers were not to red-tag any equipment. (CX 5; TR 634) On July 22, 1997, Art Bikowitz, a dock supervisor, issued a memorandum to yard men which stated that red tags were to be written up and left on tractors, trailers, and jiffs (dollies). (CX 6; TR 647) On August 6, 1997, Rick Manning, a relay coordinator, issued a memorandum stating that switchers could red-tag only with the approval of the relay department. (CX 7; TR 649)

Complainant testified that he attempted to comply with Respondent's policy of obtaining approval from the relay department before red-tagging defective equipment. (TR 76-77) However,

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[3]Equipment refers to tractors, trailers, and dollies that switchers inspect in the course of their drop and hook duties. (TR 48)

Complainant stated he became concerned after finding red tags he had placed on equipment scattered on the ground, and after coming across the same equipment unrepaired and still in a defective condition. (TR 77-80) Complainant testified that because his safety concerns were not being addressed by Respondent, he continued to red-tag equipment without the approval of the relay department. (TR 70)

On August 5, 1997, relay coordinator Manning issued to Complainant a written "Disciplinary Action" for failing to follow instructions when he red-tagged a piece of equipment without the approval of the relay department and for performing "duties" outside his job description. (CX 16) Manning testified that he had previously instructed Complainant not to perform a pre-trip inspection while engaging in purely switching duties. (TR 724-34) On August 14, 1997, Pat Walker, garage/properties manager, gave Complainant a written warning for failing to follow instructions because he red-tagged equipment without authorization. (CX 17, p. 3) On October 16, 1997, Complainant was again given a written warning for red-tagging two trailers without obtaining authorization. The warning letter stated that the trailers Complainant red-tagged were determined to have no defects by a certified mechanic. (CX 18, p. 3) Chris Peter, the relay coordinator who issued the discipline, stated in a note that he had previously instructed Complainant not to perform pre-trip or safety inspections while shuttling trailers. (CX 18, p. 2) On October 20, 1997, Complainant was suspended for one day for taking a trailer out of service. Walker, who issued the discipline, stated that Complainant's actions caused Respondent avoidable cost because the trailer was found to be "within the guidelines." (CX 19) Complainant testified that on October 28, 1997, Tom West, terminal manager, warned him not to red-tag equipment and if Complainant continued to do so, West would see him "out on the streets without a job." (TR 142) On November 7, 1997, Frank Ilacqua, assistant terminal manager, suspended Complainant for five days for taking six trailers out of service by red-tagging them. The suspension letter stated that the trailers were inspected and found to be within the guidelines. (CX 20) On January 14, 1998, Ilacqua suspended Complainant for an additional five days for red-tagging a trailer without receiving authorization from the relay department. (CX 22) Robert Beck, assistant terminal manager, testified that on January 23, 1998, he told Complainant not to perform a complete inspection of equipment while performing purely switching duties. Rather, Beck told Complainant that at those times he should only visually inspect for and report obvious defects. (TR 784; RX 4)

On June 12, 1998, Complainant visited the OSHA office in Bowmansville, New York and complained that the yard horses were unsafe. (TR 191-93) In response, on June 19, 1998, two OSHA officials and an inspector from the New York Department of Transportation ("NY DOT") visited Respondent's Buffalo terminal. (TR 200-04) Respondent's personnel, Tom West, Ray Tangent, Pat Walker, and Larry Aiello, accompanied the OSHA and NY DOT officials while they inspected Respondent's yard horses. (TR 201, 590) At that time Complainant was operating one of the yard horses and was asked to bring it to the location where the government officials were conducting the inspections. (TR 203) Complainant testified that, at that time, he told the OSHA officials, in the presence of West, Tangent, Walker, and Aiello, that he was the person who had complained to OSHA about the yard horses. (TR 204) Larry Aiello, Roadway's district safety manager, testified that he was the only person present, other than the NY DOT inspector and the two OSHA inspectors, when Complainant stated that he had made the complaints to OSHA. (TR 709)

Complainant testified that after he assisted the government officials with their inspection of the yard horse he was operating, he came across a trailer with defective brakes in the terminal yard and immediately notified Joe Petrowski, a yard controller, of the problem. Complainant further testified that Petrowski told him to take the defective trailer "to the garage." (TR 210-11) Complainant stated that as he was taking the trailer to the garage, he came upon Jerry Mathison, a mechanic, accompanied by Tangent, West, Walker, and Aiello. Complainant testified that he told Mathison about the defective trailer and Mathison instructed him to take it "to the garage."[4] (TR 211-12) Complainant further testified that he placed the defective trailer inside the garage because he interpreted "to the garage" to mean "in the garage." (TR 212) However, both Tangent and Aiello testified that Mathison told Complainant to put the trailer behind the garage. (TR 597-98; TR 698) On June 19, 1998, Walker issued a letter suspending Complainant for ten days for failing to put the trailer behind the garage as instructed and for his "overall work record." Complainant filed a grievance with Local 357 regarding his suspension. (CX 26)

On July 2, 1998, Walker gave Complainant a letter discharging him from employment for performing an inspection on a yard horse. The termination letter stated that on that date Complainant was performing an unsafe and unauthorized vehicle inspection. (CX 27; RX 7) In a written statement regarding Complainant's actions on July 2, 1998, Walker stated that he observed Complainant tilt the tractor cab backwards, which Walker said was not required to check fluid levels, that Complainant crawled underneath the equipment to check the brakes, and that he ran the boom all the way up and tugged on it to see if there was any movement. (RX 7, p. 11) Complainant testified that he did not crawl under the yard tractor as alleged, and that he checked fluid levels as required by Roadway's inspection checklist for yard tractors. (TR 136-39) Complainant filed a grievance regarding his discharge. (RX 7, p. 14) On January 25, 1999, the Teamsters Eastern Regional Joint Area Committee, consisting of representatives of the covered employers and the union, upheld the discharge.[5] (CX 27, p. 5)

B. <u>Discussion</u>

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[4]Complainant testified that although Petrowski had already told him to take the defective trailer to the garage, he stopped and asked Mathison because of Respondent's policy which required permission from a mechanic to go inside the garage. (TR 232-33; CX 8)

[5]Under the National Master Freight Agreement between the Teamsters Union and the covered employers, after a grievance is filed it is heard by the local, state, and area joint committees. (ALJ 2) Beck testified that the joint local committee, the Buffalo Joint Local Committee, consists of three union members and three management members from other companies. If a majority decision is not reached, the grievance goes to the next level, the state joint area committee, then to the regional joint area committee, and finally to arbitration. (TR 761-63) Because the Buffalo Joint Local Committee and the New York State Joint Area Committee were both deadlocked regarding Complainant's allegations of wrongful discharge, the Eastern Regional Joint Area Committee heard the matter.

Where, as here, a case is fully tried on the merits, it is not necessary to determine whether the complainant presented a prima facie case and whether the respondent rebutted that showing. United States Postal Service Board of Governors v. Aikens, 460 U.S. 709, 713-14 (1983); Pike v. Public Storage Companies, Inc., 98-STA-35 (ARB Aug. 10, 1999); Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia, 97-STA-30 (ARB July 8, 1998). Although this case was fully tried on the merits, it is convenient to analyze the case under the traditional algorithm. When a complainant establishes that he engaged in protected activity, that the respondent was aware of such activity at the time it decided to terminate the complainant, and that the protected activity provided a motive for that decision, the respondent must then provide a legitimate non-retaliatory reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987) If the respondent asserts both legitimate and discriminatory reasons for an adverse action, the "dual motive" analysis applies. Spearman v. Roadway Express, Inc., 92-STA-1 (Sec'y June 30, 1993)

1. Protected Activity

Complainant alleges that he engaged in protected activity when he inspected a yard horse on July 2, 1998, when he red-tagged both yard horses and over-the-road vehicles, and when he complained to OSHA on June 12, 1998 about the condition of the yard horses.

Under the Act, "[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding . . . ." 49 U.S.C. § 31105(a) (1994). The regulations of the Federal Highway Administration ("FHWA") define "commercial motor vehicle" as:

> any self-propelled or towed vehicle used on public highways in interstate commerce to transport passengers or property when:
> (a) The vehicle has a gross vehicle weight rating or gross combination weight rating of 4,537 or more kilograms (10,001 or more pounds); or
> (b) The vehicle is designed to transport more than 15 passengers, including the driver; or
> (c) The vehicle is used in the transportation of hazardous materials in a quantity requiring placarding under regulations issued by the Secretary under the Hazardous Materials Transportation Act. (49 U.S.C. 5101, *et. seq.*)

49 C.F.R. 390.5.

Respondent argues that the yard horses utilized in its terminal are not covered commercial motor vehicles, but stipulated that they weigh more than 10,000 pounds. (Respondent's Brief, p. 14) Therefore, the yard horses come within the definition of commercial motor vehicles if they travel on public highways. "Highways" are defined as "any road, street, or way, whether on public or private

property, open to public travel." 49 C.F.R. 390.5. The regulations state that "open to public travel means that the road section is available, except during scheduled periods, extreme weather or emergency conditions, passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight, or class of registration." Id. Complainant argues that yard horses are commercial motor vehicles covered by the Federal Motor Carrier Safety Regulations (the "FMCSR") because Respondent's Buffalo terminal is a "highway" as defined by the FHWA. (Respondent's Brief, p. 22) Complainant asserts that the fact that the terminal yard is not restricted by any gate, no signs are posted restricting entry to the public, and he along with other drivers encountered members of the public in the terminal almost on a daily basis support his argument that the Buffalo terminal is a highway. (TR 100-03) I find Complainant's arguments unpersuasive. There is evidence that during the time Complainant was employed at the Buffalo terminal, there was at least one sign which prohibited unauthorized persons and private vehicles from entering the yard. (RX 6) In addition, Complainant conceded that the terminal was enclosed by a chain link fence and that employees entered the terminal through a turnstile gate. (TR 380) Complainant further conceded that people he saw at the terminal could have been there on company business. (TR 381-382) Finally, the FHWA has stated that it "never intended to expand the definition of 'public road' to encompass any roadway only remotely accessible to the public at large." Review of the Federal Motor Carrier Safety Regulations; Regulatory Removals and Substantive Amendments, 63 FR 33254-01 (June 18, 1998). Based on the foregoing, I find that Respondent's Buffalo terminal does not constitute a public highway as defined by the FHWA.

Complainant also argues that the yard horses "are commercial motor vehicles notwithstanding the fact that they are, for the moment, operating on private property." (Complainant's Brief, p. 18) This contention is tantamount to an argument that there is no private property exception to the FMCSR. In support of this argument, Complainant cites motor carrier cases which establish the jurisdiction of the Interstate Commerce Commission ("ICC") to regulate the qualifications and hours of service for employees affecting the safety of commercial motor vehicles. Jurisdiction Over Employees of Motor Carriers (Ex Parte No. MC-28), 13 M.C.C. 481, 1 Fed. Carrier Cases (CCH) ¶ 7344.04 (1939); Maximum Hours of Service of Motor Carrier Employees, (Ex Parte No. MC-2), 28 M.C.C. 125, 2 Fed. Carrier Cases (CCH) ¶ 7700.01 (1941); Levinson v. Spector Motor Service, 330 U.S. 649 (1947). In Maximum Hours of Service of Motor Carrier Employees, the ICC found that it had the power to establish qualifications and maximum hours of service for mechanics, loaders, and helpers because they devoted a substantial part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate commerce. 28 M.C.C. at 138-139. However, although employees who work exclusively within the terminal may be regulated by FMCSR, the FHWA has taken the view that vehicles used wholly within the terminal yard are not covered by the FMCSR. See 62 Federal Register 16,405 (RX 1) Regulatory guidance question 16(b) asked: "Are vehicles and drivers used wholly within terminals and on premises or plant sites subject to the FMCSRs?" The FHWA answered: "No." Id. I find that Respondent's yard horses are vehicles used wholly within its terminal and, thus, are not subject to the FMCSR.

Complainant also posits that because he has driven a yard horse outside Respondent's terminal yard, that is sufficient to convert these vehicles into commercial motor vehicles. Complainant testified that he drove a yard horse outside the terminal yard during a snow storm to tow a stranded vehicle back to Respondent's premises. (TR 53-54) I find that the one or two times Complainant may have driven a yard horse off the terminal yard is insufficient to change the nature of the yard horse from a vehicle used to transport trailers within the terminal yard to a commercial motor vehicle used on public roadways.

In the alternative, Complainant argues that even if I find that the terminal yard is not a highway as defined by the FHWA, his complaint to OSHA on June 12, 1998 regarding the safety of yard horses is still "related to" a violation of a commercial motor vehicle safety regulations. Complainant alleges that even though yard horses are not operated on the highways, their operation on the terminal affects the operation of trailers that do operate on the highways. For example, Complainant argues that "the hydraulic fifth wheel booms and bushings [on the yard horses] were loose causing trailers to sway with the possibility of uncoupling." (Complainant's Brief, p. 22) Complainant cites 49 C.F.R.§§ 393.70 and 396.7 to support his argument. However, those regulations do not apply to yard horses. Rather, it is clear that they deal with the regulation of commercial motor vehicles and their safety on the highways (and I have already determined that yard horses are not commercial motor vehicles as defined in 49 C.F.R. 390.5).

In sum, I find that yard horses are not commercial motor vehicles as defined by the FHWA, but rather are vehicles used wholly within Respondent's terminal. Complainant's actions involving yard horses - viz., red-tagging of yard horses, inspection of a yard horse on July 2, 1998, and the complaint to OSHA on June 12, 1998 regarding the safety of yard horses - are not covered by the FMCSR and, thus, cannot constitute protected activity under the Act.

Complainant's red-tagging of trailers remains the only activity that could be protected under the Act. Respondent argues that Complainant's red-tagging of trailers is time-barred because these activities occurred more than 180 days before the filing of his July 27, 1998 complaint. (Respondent's Brief, p. 18) I disagree. If Respondent's argument is correct, an employer could immunize itself from violating the Act by simply waiting 180 days after an employee engaged in protected activity before taking adverse action against the employee. Rather, it is clear that the 180-day statute of limitations does not start to run until the employer takes adverse action against the employee. Indeed, Respondent has conceded that it fired Complainant because of his overall work record which included red-tagging of trailers. (TR 790-92; CX 27) Therefore, I find that Complainant's acts of red-tagging trailers are not time-barred.

Complainant's red-tagging activities related to trailers constitute protected activity under the Act because they are internal complaints related to the safety of commercial motor vehicles.[6]

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[6]Once a complainant establishes that he engaged in protected activity, he must then establish that the respondent knew of the protected activity. In the instant case, Respondent stated repeatedly that part of its motivation for terminating Complainant was his overall work record, including the red-

Schulman v. Clean Harbors Environmental Services, Inc., 98-STA-24 (ARB Oct. 18, 1999). The Administrative Review Board ("ARB") in Schulman held that daily vehicle inspection reports which express safety-related concerned are "complaints" under the Act. The vehicle service inspection reports in Schulman were reviewed by the employer to determine whether there was a safety violation or defect which required the vehicle to be placed out of service. In the instant case, red-tagging accomplishes the same purpose as vehicle service inspection reports because once an employee red-tags equipment, Respondent determines what, if any, repairs need to be made. The Secretary's interpretation of the employee protection language to encompass purely internal complaints has been consistently upheld. See Yellow Freight Sys., Inc. v. Reich, 8 F.3d 980, 986 (4th Cir. 1993); Yellow Freight Sys., Inc. v. Martin, 983 F.2d 1195, 1198 (2d Cir. 1993); Clean Harbors Envtl. Services, Inc. v. Herman, 146 F.3d 12 (1st Cir. 1998).

2. Articulation of a Nondiscriminatory Reason for Adverse Action

Under the Act, it is not an employer's burden to prove a legitimate, nondiscriminatory, non-pretextual reason for its action in order to rebut evidence raising a reasonable inference of retaliatory discharge. Rather, if a complainant presents evidence raising a reasonable inference of retaliatory discharge, the employer need only articulate a nondiscriminatory reason for its adverse action. At all times, the complainant has the burden of establishing that the real reason for discharge was discriminatory. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Shute v. Silver Eagle Co., 96-STA-19 (ARB June 11, 1997).

In the instant case, Respondent asserts that Complainant was discharged because he repeatedly violated Roadway's rules and disregarded instructions from his supervisors. (RX 7) An employee's resistance to complying with an employer's procedures constitutes a non-discriminatory reason for termination. Jacobson v. Beaver Transportation, Inc., 92-STA-17 (Sec'y Aug. 31, 1992).

3. Dual Motive Analysis

The dual motive doctrine arises when it is found that an employer's adverse action against an employee was motivated by both prohibited and nondiscriminatory reasons. See Price Waterhouse v. Hopkins, 490 U.S. 228, 250-58 (1989); Park v. McLean Transportation Services, Inc., 91-STA-47 (Sec'y June 15, 1992); Wilson v. Bolin Associates, Inc., 91-STA-4 (Sec'y Dec. 30, 1991); McGavock v. Elbar, Inc., 86-STA-5 (Sec'y July 9, 1986). The Secretary has held that "[w]here there is direct evidence that the adverse action is motivated, at least in part, by the protected activity, the respondent may avoid liability only by establishing that it would have taken the adverse action in the absence of the protected activity." Caimano v. Brink's, Inc., 95-STA-4 (Sec'y Jan. 26, 1996); see Price Waterhouse v. Hopkins, 490 U.S. at 250-58; Wilson v. Bolin Associates, Inc., 91-STA-4, slip op. at 4.

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tagging of trailers. (TR 790-92; CX 16-22, 26) Therefore, it is clear that Respondent knew of the protected activity.

Respondent asserts that Complainant engaged in three acts which constitute the failure to follow its rules: red-tagging equipment without authorization from the relay department; the June 19, 1998 incident in which Complainant placed a trailer inside the garage after allegedly being instructed to put it behind the garage; and performing an unauthorized and dangerous inspection of a yard horse on July 2, 1998.

Respondent argues that it did not discipline Complainant for red-tagging equipment but because he failed to follow its rules on how to red-tag equipment. (Respondent's Brief, p. 21) Respondent required yard personnel to obtain authorization from the relay department prior to red-tagging equipment. (CX 7) Respondent argues that it maintains this policy because red-tagging places equipment out of service for an indefinite period of time and therefore has severe consequences on the operation of its terminal. Furthermore, Respondent asserts that Complainant, who is not a certified mechanic, was not qualified to make a unilateral determination as to whether equipment should be placed out of service. (Respondent's Brief, p. 20-21)

The Secretary has held that "to permit an employer to rely on a facially-neutral policy to discipline an employee for engaging in statutorily-protected activity would permit the employer to accomplish what the law prohibits." Self v. Carolina Freight Carriers Corp., 91-STA-25 (Sec'y Aug. 6, 1992). In Self, the Secretary went on to state that the employer "would not have issued [the employee] a suspension had he not refused to drive when fatigued. Consequently, [the employer] disciplined [the employee] 'for' his protected activity." Id. at 6. Here, Respondent asserts that it disciplined Complainant for his failure to follow Roadway's policy to obtain authorization prior to red-tagging rather than for red-tagging per se. However, had Complainant not red-tagged, he would not have been disciplined. Therefore, I find that Complainant was disciplined for his protected activity of red-tagging.

The next question is whether Respondent's legitimate business interests of maintaining order and preventing delays outweigh the policies underlying the Act. Self, supra. Self noted that -

> [The] right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against employer's right to maintain order and respect in its business by correcting insubordinate acts; [the] key inquiry is whether [the] employee has upset [the] balance that must be maintained between protected activity and shop discipline . . . .

Id., slip op. at 6, citing Kenneway v. Matlack, Inc., 88-STA-20 (Sec'y June 15, 1989).[7]

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[7]This issue has also been addressed in cases under Title VII of the Civil Rights Act of 1964, in which it has been held that "certain forms of opposition, including illegal acts or unreasonably hostile or aggressive conduct, may provide a legitimate, independent and nondiscriminatory basis for sanctions." EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1012 (9th Cir. 1983). Stated differently, the form of opposition may remove Title VII protections. Id. at 1015; Silver v. KCA, Inc.,

Complainant testified that he attempted to comply with Respondent's requirement of obtaining authorization prior to red-tagging equipment. (TR 76) Complainant testified, however, that eventually he red-tagged without obtaining the relay department's approval because after red-tagging a piece of equipment, he would come across that same equipment a day or two later with the defects uncorrected, but fully loaded and in the outbound line. (TR 77) Complainant also testified to seeing red tags that he had filled out lying on the ground many times. (TR 79) According to Complainant, his motivation in red-tagging equipment without the approval of the relay department was to put other switchers, mechanics, drivers, and other personnel on notice that the equipment was defective. (TR 80) Furthermore, Complainant stated that, almost daily, he was told to place equipment on the ready line to go out onto the highways although he knew the trailers had defects that would affect safety. (TR 80-81) On the other hand, Respondent's interest lies in preventing delays in its operation by employees placing equipment out of service when the equipment does not have a defect. In support of its position, Respondent argues that many of the trailers that Complainant red-tagged were later found to be within regulations. (CX 18-20) However, I find Complainant to be credible and conclude that he red-tagged the trailers under a good faith belief that they were unsafe. Protection under the Act is not dependent on the employee proving an actual safety violation. Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992). Furthermore, Alex Glanville, Respondent's yard controller from January to April 1998, testified that Complainant's complaints regarding defects and safety problems were legitimate. (TR 464) Michael Larson, a switcher at the terminal, on questioning by the undersigned testified that Complainant was not "nit-picking or complaining about things that he should not have been complaining about." (TR 550)

The Act should be interpreted liberally to promote the Congressional intent to promote the safety of commercial motor vehicles on the nation's highways. See generally, Boone v. TFE, Inc., 90-STA-7 (Sec'y July 17, 1991); Trans Fleet Enterprises, Inc. v. Boone, 987 F.2d 1000 (4th Cir. 1992); Somerson v. Yellow Freight Systems, Inc., 98-STA-9 (ARB Feb. 18, 1999). I find that Complainant's acts of red-tagging without prior approval from the relay department was reasonable conduct in light of his good faith belief that his safety concerns were not being addressed by Respondent. I also find that Respondent's legitimate interest in preventing delays is entitled to less weight than Complainant's legitimate concern about safety defects he discovered in the course of performing his duties.

Respondent also argues that it discharged Complainant, in part, because of his alleged failure to follow Company rules on June 19, 1998 by putting a trailer inside the garage without a mechanic's approval. (Respondent's Brief, p. 24) On June 19, 1998, OSHA made an unannounced visit to Respondent's Buffalo terminal in response to Complainant's complaint to OSHA regarding the unsafe condition of the yard horses. (TR 200-04) It is undisputed that after assisting the OSHA and NY DOT officials with the inspection of the yard horses, Complainant returned to work and found a trailer with defects. (TR 210) It is also undisputed that Complainant informed Petrowski of the

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586 F.2d 138, 141 (9th Cir. 1978). See Jennings v. Tinley Park Comm. Consol. Sch. Dist., 864 F.2d 1368, 1372 (7th Cir. 1988)(decision to discipline employee "whose conduct is unreasonable, even though borne out of legitimate protest, does not violate Title VII").

defects and Petrowski told him to take the trailer "to the garage." (TR 211) Complainant alleges that he was proceeding to the garage when he saw Mathison who told him to take the trailer "to the garage." (TR 211-12) On the other hand, Respondent alleges, through the testimonies of Aiello and Tangent, that Mathison told Complainant to put the defective trailer behind the garage. (TR 597-98; TR 698) Respondent argues that its policy of requiring a mechanic's permission before taking equipment into the garage stems from a near fatal accident which occurred at its Buffalo terminal and Complainant's failure to follow Mathison's instructions to put the trailer behind the garage placed other employees at risk. (TR 676-77; CX 8) Complainant alleges that Respondent disciplined him in retaliation for his safety complaints and that Respondent's contention that he was disciplined for failing to follow instructions is a pretext. In his post-hearing brief, Complainant acknowledges that he could have misunderstood Mathison but argues that there was no evidence that he intentionally disobeyed the mechanic's instructions. (Complainant's Brief, p. 27) However, the Secretary has held that the critical focus of the inquiry is the employer's subjective perception of the circumstances at the time it took adverse action. Allen v. Revco D.S., Inc., 91-INA-9 (Sec'y Sept. 24, 1991) I find that the evidence supports the conclusion that Respondent was of the belief that Complainant violated its rule when he placed the trailer inside the garage. Thus, I find that Complainant has failed to establish that the discipline he received for the June 19, 1998 incident is pretextual.

In addition, Respondent argues that it discharged Complainant, in part, for his unauthorized and dangerous inspection of a yard horse on July 2, 1998. (Respondent's Brief, p. 22) On July 2, 1998, Walker gave Complainant a termination letter discharging him from employment for performing an inspection on a yard horse. The termination letter stated that on that date Complainant was performing an unsafe and unauthorized vehicle inspection. (CX 27; RX 7) In a statement regarding Complainant's actions on July 2, 1998, Walker noted that he observed Complainant tilt the cab backwards, which Walker said was not required to check fluid levels and that raising the hood was extremely unsafe because the cab could have fallen and crushed Complainant. Walker also stated that he observed Complainant crawl underneath the equipment to check the brakes and that he ran the boom all the way up and tugged on it to see if there was any movement. (RX 7, p. 11) On the other hand, Complainant testified that although on October 28, 1997, West told him not to raise the hoods on the tractors, Tangent gave him permission to do so two weeks later. (TR 139) Tangent testified that he told Complainant not to lift the hoods on the tractors but to use the web system to check the fluid levels. However, Tangent conceded that it would have been appropriate to lift the hood if there was a problem with the web system. (TR 668) Complainant also testified that he did not crawl under the yard tractor as alleged and that he could not physically fit underneath the yard tractor because there is only six to seven inches from the bottom of the exhaust to the ground. (TR 137) Larson, a switcher at the terminal, corroborated Complainant's testimony that it is approximately seven inches from the ground to the exhaust system of the yard horse and that it was impossible for Complainant to crawl underneath the yard horse. (TR 508) Beck testified that he is unaware of any specific work instruction or rule Complainant violated by tugging on the boom but assumed Walker must have instructed Complainant not to do so. On questioning by the undersigned, Beck conceded that he did not know what particular instructions Walker gave to Complainant regarding the boom. (TR 813-815) Based on the foregoing, I find that Complainant did not engage in an unsafe and unauthorized inspection of a yard horse on July 2, 1998, and that Respondent's contention is pretextual.

Finally, Respondent maintains that Complainant had been warned numerous times that while performing switching duties, he was not to perform a full pre-trip inspection of the equipment, but only visually check for defects. Respondent contends that Complainant consistently failed to comply with its instructions to perform only a visual check and that this failure had a detrimental effect on its operations. (TR 572-74; TR 723-24; CX 18; RX 4) In particular, Respondent alleges that Complainant's inspections took an unreasonable amount of time and that his production was affected adversely. (Respondent's Brief, p. 23) Tangent testified that Complainant's "moves per hour" were substantially less than the rest of the switchers employed by Respondent. (TR 580-81) However, Glanville testified that Complainant's production was equal to or better than any other switcher on the shift. (TR 484) Although Respondent posits that Complainant's production was adversely affected, Roadway did not provide any records or other evidence that clearly shows his alleged shortcoming. An employer's "failure to adduce testimony that projects a clear image of the shortcomings in [the employee's] work performance allegedly relied on by [the employer] casts further doubt on whether [the employer] was motivated solely by those factors." Timmons v. Franklin Electric Cooperative, 1997-SWD-2 (ARB Dec. 1, 1998), slip op. at 5; See also Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1012 (1st Cir. 1979). Therefore, I find that Respondent's contention that it was motivated to discharge Complainant because of his poor production is pretextual.

In sum, Respondent has provided one valid nondiscriminatory reason for its adverse action, viz., Complainant's failure to follow instructions by putting a trailer inside the garage on June 19, 1998.[8] On the other hand, Complainant has established that Respondent's adverse action was motivated, at least in part, by his red-tagging of equipment which I have found to be protected activity. Therefore, Respondent must establish that it would have taken the same adverse action against Complainant even had he not engaged in protected activity. Respondent has consistently argued that it suspended and ultimately discharged Complainant for the June 19, 1998 incident of putting a trailer inside the garage, the unauthorized inspection of a yard horse on July 2, 1998, and because of his overall work record which included his red-tagging of equipment. Based on Respondent's own contentions, its lawful and unlawful motives are commingled and cannot be separated. Therefore, I find that Respondent has failed to show that it would have terminated Complainant absent his protected activities.

VI. DAMAGES

Under the Act, Complainant, as a successful litigant, is entitled to a remedy requiring Respondent to take affirmative action to abate the violation, reinstate him to his former position with

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[8]Respondent, citing Becton v. Detroit Terminal of Consolidated Freightways, 687 F.2d 160 (6th Cir. 1992), argues that it has established a legitimate basis for its termination of Complainant because the termination was upheld under the collective bargaining agreement by the Teamsters Eastern Regional Joint Area Committee. (Respondent's Brief, pp. 19-20) As I have found that Respondent had, at least in part, a nondiscriminatory motive for terminating Complainant, I need not determine whether the principle in Becton is applicable to the grievance procedure in the instant case.

the same pay, terms and privileges of employment, and compensatory damages, including back pay. 49 U.S.C. § 31105 (b)(3)(A). Costs, including attorney's fees, reasonably incurred in bringing the complaint, may also be assessed against Respondent. 49 U.S.C. § 31105 (b)(3)(B). Complainant has requested the following relief:

1. Reinstatement to his previous position as switcher at Respondent's terminal in West Seneca, New York, with full seniority and other privileges of employment;
2. Expungement of the disciplinary letters dated August 4, 1997, August 14, 1997, October 16, 1997, October 20, 1997, January 18, 1998, June 19, 1998, and July 2, 1998;
3. Back pay from January 25, 1999 to February 14, 2000 in the amount of $45,621.49, plus $751.55 per week from February 14, 2000 until Complainant is reinstated;
4. Reimbursement of Complainant's medical costs in the amount of $5,317.95;
5. Interest on Complainant's damages;
6. Payment of all sums necessary to fund Complainant's pension, health and welfare benefits with the Teamsters Central States Pension Fund and Teamsters Central States Health and Welfare Fund that Respondent would have been required to pay but for its termination of Complainant's employment;
7. Payment of attorney fees, expenses, and costs;
8. An order requiring Respondent to post a copy of this decision in a conspicuous location at all of Respondent's terminals.

(Complainant's Brief, pp. 31-32)

Reinstatement

Under the Act, the Secretary must order reinstatement upon finding reasonable cause to believe that a violation occurred. The reinstatement directive takes effect immediately. Spinner v. Yellow Freight Systems, Inc., 90-STA-17 (Sec'y May 6, 1992).

Expungement of Disciplinary Letters

In Shamel v. Mackey, 85-STA-3 (Sec'y Aug. 1, 1985), the Secretary ordered the respondent to purge Complainant's employment records of any and all references suggesting that Complainant was discharged for cause. Also, the Secretary ordered the respondent to expunge from its personnel files a warning letter and notice of suspension pertaining to the complainant's work refusal. Self v. Carolina Freight Carriers Corp., 91-STA-25 (Sec'y Aug. 6, 1992).

Consequently, I shall order Respondent to expunge from its personnel files and records system the disciplinary letters dated August 5, 1997, August 14, 1997, October 16, 1997, October 20, 1997, November 7, 1997, January 14, 1998 as they relate to Complainant's protected activity. (CX 16-20; CX 22) Furthermore, inasmuch as Complainant was suspended on June 19, 1998 not only for the infraction which occurred that day but also for his overall record including his protected activity, Respondent is to expunge from its personnel files and records system the suspension letter dated June

19, 1998. (CX 26) Finally, Respondent is to expunge from its personnel files and records system the termination letter dated July 2, 1998 because I have found that Complainant did not engage in an unsafe and unauthorized inspection of a yard horse on that day and that Respondent's motivation in terminating Complainant was pretextual. (CX 27)

Back Wages

An award of back pay in an appropriate amount is mandated once it is determined that an employer has violated the Act. Moravec v. HC & M Transportation, Inc., 90-STA-44 (Sec'y Jan. 6, 1992), citing Hufstetler v. Roadway Express, Inc., 85-STA-8 (Sec'y Aug. 21, 1986), slip op. at 50, aff'd sub nom., Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1987). Back pay awards are to be calculated in accordance with the make-whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. (1988). See Loeffler v. Frank, 489 U.S. 549 (1988).

Although Complainant received the discharge notice on July 2, 1998, he continued to work as a switcher for Roadway until January 25, 1999, when the Eastern Regional Joint Area Committee upheld his termination. (CX 27) From February 18, 1999 to May 14, 1999, Complainant worked for Cliff Star in Dunkirk, New York as a switcher. (TR 305-06) Complainant has had no other employment since May 14, 1999.[9] (TR 306)

Complainant maintains that his back pay should be calculated in the following manner:

> Complainant earned $38,351.90 in 1998 as evidenced by his W-2 Wage and Tax Statement. (CX 29) Thus, his weekly wage in 1998 was $737.54. Complainant's hourly rate of pay while employed by Respondent was $18.49 per hour effective April 1, 1998 through March 31, 1999. (ALJ 2) However, on April 1, 1999, switchers hourly rate increased by 1.9 percent to $18.84 per hour. Thus, Complainant argues his weekly wage should be increased 1.9 percent to $751.55 on April 1, 1999.

(Complainant's Brief, pp. 29-30) Back pay calculations must be reasonable and supported by the evidence of record, but need not be rendered with "unrealistic exactitude." Cook v. Guardian Lubricants, Inc., 95-STA-43 (ARB May 30, 1997). Back pay awards are, at best, approximate and any "uncertainties in determining what an employee would have earned but for the discriminations should be resolved against the discriminating employer." Pettway v. American Cast Iron Pipe Co., Inc.,494 F.2d 211, 260-61 (5th Cir. 1974). Based on the foregoing, I find that Complainant is entitled to back wages in the amount of $6,859.12 from January 25, 1999 through March 31, 1999 (9.3 weeks X $737.54) and $39,606.69 from April 1, 1999 through April 3, 2000 (52.7 weeks X 751.55), for a total of $46,465.81.

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[9]Respondent has not made any assertion that Complainant failed to mitigate his damages.

Complainant's back pay must be offset by his interim wages. Complainant testified that he earned $10.00 an hour working for Cliff Star in Dunkirk, New York from February 18, 1999 to May 14, 1999. (TR 305-06) Complainant also testified that he worked an average of 48 to 52 hours a week and that he earned one and a half times his base rate of pay for work over 40 hours a week. (TR 305-07) Using 50 hours a week as an average that Complainant worked for Cliff Star, I find that he earned $4,800 in base pay and $1,800 in overtime, for a total of $6,600. Therefore, Complainant's projected wages of $46,465.81 are reduced by his interim earnings of $6,600 leaving $39,865.81 as his total wage loss to April 3, 2000.

Under the National Master Freight Agreement, Complainant is also entitled to the following: 9 holidays for 9 hours straight time at $18.84 per hour totaling $1,526.04; 2 roving holidays for 8 hours straight time at $18.84 per hour totaling $301.44; 5 sick days for 8 hours straight time at $18.84 per hour totaling $753.60; and 3 weeks of vacation at 45 hours per week at $18.84 per hour totaling $2,543.40. Furthermore, where an employer is found to have violated the Act and the complainant is found to be entitled to an offer of reinstatement to his or her former position and to back pay, the employer's liability for back pay continues until such time as the employer reinstates the complainant or makes him a bona fide offer of reinstatement. Polewsky v. B & L Lines, Inc., 90-STA-21 (Sec'y May 29, 1991). Therefore, Complainant is entitled to back pay in the amount of $44,990.29 through April 3, 2000, as well as $751.55 per week from April 3, 2000 until Complainant is reinstated.

Medical Bills

Although in his post-hearing brief, Complainant argues that he is entitled to reimbursement of medical expenses totaling $5,319.95, he submitted a listing of his uncovered medical costs totaling only $1,741.09. Therefore, I find that Complainant has established entitlement to reimbursement of medical expenses submitted which total $1,741.09. (CX 30)

Interest on Back Pay

Complainant is entitled to interest on the back pay to compensate for loss suffered due to Roadway unlawfully depriving him of the use of his money. Hufstetler v. Roadway Express, Inc., 85-STA-8 (Sec'y Aug. 21, 1986), aff'd sub nom., Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1987). Prejudgment interest shall be calculated in accordance with 26 U.S.C. § 6621 (1988), which specifies the rate for use in computing interest charged on underpayment of Federal taxes. See Park v. McLean Transportation Services, Inc., 91-STA-47 (Sec'y June 15, 1992), slip op. at 5; Clay v. Castle Oil Co., Inc., 90-STA-37 (Sec'y June 3, 1994).

Retroactive Pension, Health and Welfare Benefits

Respondent is also required to pay the pension contributions and the health and welfare benefits of which Complainant has been deprived as a result of the unlawful actions of Respondent. See Hufstetler v. Roadway Express, Inc., 85-STA-8 (Sec'y Aug. 21, 1986).

Attorney's Fees

On February 23, 2000, counsel for Complainant, Paul O. Taylor, Esquire, submitted a Petition for Costs and Attorney Fees in the amount of $35,540.41. This amount represents 145.75 hours of work by Attorney Taylor at $225.00 per hour and $2,746.77 in expenses. Respondent has not submitted objections to the fee petition.

In order to determine the fees to be awarded under the Act, "it is usual to use the lodestar method which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424 (1984). I find that Attorney Taylor's rate of $225.00 per hour and the hours he expended on the case are reasonable.

Posting of Notice of Decision

It is appropriate to require Roadway to post this decision at the facility where Complainant worked. Scott v. Roadway Express, Inc., 1998-STA-8 (ARB July 28, 1999). In Smith v. Esicorp., Inc., 1993-ERA-16 (ARB Aug. 27, 1998), Respondent was ordered to post the decision of the ARB and an earlier Secretary of Labor remand decision, in a lunchroom and another prominent place accessible to its employees for a period of 90 days.

RECOMMENDED ORDER

Respondent is Ordered to:

1. Reinstate Complainant to his previous position as a switcher with full seniority and privileges of employment effective immediately;

2. Expunge from its personnel files and records system the following: disciplinary letters dated August 5, 1997, August 14, 1997, October 16, 1997, October 20, 1997, November 7, 1997, January 14, 1998, suspension letter dated June 19, 1998, and termination letter dated July 2, 1998;

3. Pay to Complainant back wages for the period of January 25, 1999 through March 27, 2000 in the amount of $44,990.29, plus $751.55 per week from April 3, 2000 until Complainant is reinstated;

4. Reimburse Complainant for medical bills in the amount of $1,741.09;

5. Pay to Complainant interest on the back pay award calculated in accordance with 26 U.S.C. § 6621 (1998);

6. Pay on behalf of Complainant all pension contributions as well as health and welfare benefits to which he would have been entitled had he not been discharged;

7. Pay Complainant's attorney fees and expenses in the amount of $35,540.41;

8. Post a copy of this decision for 90 days in a prominent place accessible to employees at Roadway's terminal in West Seneca, New York.

Robert D. Kaplan
Administrative Law Judge

Dated: March 30, 2000
Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).